Petition

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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KEITH KUHLMAN, PETITIONER

v.

STATE OF OHIO, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

Did the Court of Appeals of Montgomery County, Ohio, err in holding that the privilege against self-incrimination does not prohibit the use in criminal proceedings of inculpatory statements made by a public employee in an administrative context where that employee is ordered to answer questions under penalty of loss of employment for failure to do so.

Was it an error for the Court of Appeals to rule that inculpatory statements of a public employee received during an employer's investigation should not be suppressed from use at a criminal trial when the parties have entered a collective bargaining agreement prohibiting the use of such statements "at any stage (Grand Jury or Trial) in any criminal proceeding against the employee."

Did the Court of Appeals of Montgomery County, Ohio, err in holding that the Government can use evidence obtained by its own failure to apprise a Defendant, during an administrative proceeding against him, of contemplated or recommended parallel criminal preceedings for the same conduct.

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(1) The Fifth Amendment, United States Constitution
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KEITH KUHLMAN, PETITIONER

v.

STATE OF OHIO, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO, SECOND APPELLATE DISTRICT

Petitioner, Keith Kuhlman, prays that a Writ of Certiorari be issued to review the Final Entry of the Court of Appeals of Montgomery County, Ohio, Second Appellate District, reversing the Judgement Entry of the Common Pleas Court of Montgomery County, Ohio, suppressing certain evidence.

OPINIONS BELOW

The Entry of the Supreme Court of the State of Ohio appears herein at Appendix page xiii. The Final Entry and Opinion of the Court of Appeals of Montgomery County, Ohio appears at Appendix pages iv and v. The Judgement Entry of the Common Pleas Court of Montgomery County, Ohio, can be found below at Appendix page i.

JURISDICTION

The Entry of the Supreme Court of the State of Ohio denying a hearing of this matter was entered on May 13, 1981. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) The Fifth Amendment, United States Constitution (See Appendix "H")

(2) The Fourteenth Amendment, United States Constitution (See Appendix "H")

(3) Ohio Rules of Criminal Procedure 12(J) (See Appendix "H")

STATEMENT OF THE CASE

A. Nature of the Case

The initiation of this case was caused by the indictments of November 14, 1979, and December 11, 1979, both arising from the same general incident

Keith Kuhlman filed a Motion to Suppress certain evidence including, but not limited to, certain written and oral statements. This Motion was filed on December 12, 1979 (Appendix).

On June 17 1980, a Hearing on the Motion to Suppress was conducted.

On June 19, 1980, the Trial Court suppressed statements made by Keith Kuhlman in a September 10, 1979, police interrogation, and evidence obtained as a direct or indirect result therefrom.

On June 24, 1980, the prosecution, pursuant to Criminal Rule 12(J), filed a Notice of Appeal of the June 19, 1980, Decision of the Trial Court. The prosecution also filed the required affidavit stating that the granting of the Motion to Suppress rendered the State's proof so weak that there was no reasonable possibility of successful prosecution.

No assignments of error were listed by the State in their brief to the Court of Appeals, and the Court of Appeals assumed "that there is only one error complained of, namely, the trial court's sustaining of the motion to suppress."

On January 27, 1981, the Court of Appeals of Montgomery County reversed the Trial Court.

On February 13, 1981, Keith Kuhlman filed a Notice of Appeal to the Supreme Court of the State of Ohio.

On May 13, 1981, the Supreme Court of the State of Ohio filed an Entry refusing to hear this matter.

B. Statement of the Facts Relevant to the Issues Presented

Detective Keith Kuhlman is a 20-year veteran of the Dayton Police Department. He is an expert in automobile theft investigation, and is respected statewide and nationwide in his field. He has an impeccable reputation.

On August 15, 1979, Kuhlman, himself, requested a meeting with Internal Affairs investigators of the Dayton Police Department to convey information about potential criminal involvement of another police officer. After this interview, on August 23, 1979, Keith Kuhlman testified before the Montgomery County Grand Jury concerning an aspect of the Internal Affairs investigation of re-assembled motor vehicle titles. From their investigation, Internal Affairs believed Keith Kuhlman would perjure himself before this Grand Jury, and had a witness waiting in their office to attempt an indictment of Keith Kuhlman. After it was learned that Keith Kuhlman was truthful, and had taken and passed a polygraph which was presented to the Grand Jury, the witness subpoenaed to attempt indictment of Keith Kulhman was not called. In any event, Internal Affairs suspected Keith Kuhlman may have been involved in felony criminal conduct on August 23, 1979, the date of the Grand Jury hearing. Even before that date, Internal Affairs had been in contact with the Montgomery County Prosecutors office concerning possible criminal charges against Detective Kuhlman as a result of their investigation.

It was stipulated that on September 10, 1979, Keith Kuhlman was ordered to appear in Internal Affairs for an interrogation. (Court of Appeals Opinion January 27, 1981 at 2.) Also introduced before the Court below were the

Rules of Conduct of the Dayton Police Department. Rule 8.3 states, in relevant part:

> 8.3 An officer *shall* answer questions by or render materials and relevant statements to appointed authority in a departmental investigation when so directed. (emphasis added)

The officer conducting the September 10th interview was Sergeant Fleming, a commanding officer. The interview was reduced to writing according to the standard departmental procedure.

As stated in the Court of Appeals Opinion:

> At the court hearing it was brought out that during such investigations it was standard practice, if the person being investigated was believed to have been involved in criminal matters, to give that person Miranda warnings; that if on September 10, Defendant had refused to answer any questions in defiance of an order to do so, he could have been subjected to departmental disciplinary action, which could have resulted in his dismissal.

(Opinion January 27, 1981, at 2, See Appendix).

Evidence was also introduced at the hearing on the Motion to Suppress in the Common Please Court of Montgomery County, Ohio, which revealed the collective bargaining agreement the City of Dayton had with its police officers. One of the provisions of this agreement provided, in relevant part:

> **Investigation by Management**
>
> Management may conduct investigation of alleged misconduct by an

> employee and require a member of the bargaining unit to submit written reports either by general or specific order. If any report shows or tends to show that the employee submitting the report has committed a crime, the use of such report will be subject to the following:
>
> (A) The report may not be used at any stage (grand jury or trial) in any criminal proceeding against the employee.

Article 8, Section 1, F.O.P. Contract, *See* Appendix.

The Court of Common Pleas of Montgomery County in ruling on the suppression motion held on the contractual requirement in the F.O.P. contract, and did not reach the constitutional issues raised therein. On appeal by the prosecution to the Court of Appeals of Montgomery County, Ohio, the defense agreed that the Decision of the Common Pleas Court was correctly founded not only on the provisions of the F.O.P. contract, but was also adequately supported by the privilege against compulsory self-incrimination of the Fifth Amendment, United States Constitution, as it applies to the States by way of the Fourteenth Amendment.

The Court of Appeals, in addressing the constitutional issues after finding the contractual basis inadequate, ruled:

> To the extent that the trial court reasoned that the motion to suppress should be granted because of the provisions of a labor contract, we hold that it erred.
>
> In his brief, Defendant contends that the lower court could have premised the suppression of the statements

upon the Fifth and Fourteenth Amendment to the United States Constitution. He argues that since he was a police officer, he was effectively coerced into submitting to the September 10 interrogation or face disciplinary action. While he had to attend the interview, he did not have to answer self-incriminating questions. In *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967), New Jersey fired employees who exercised their right to remain silent. The Supreme Court held that confessions made under such circumstances were coerced, not voluntary, and that public employees have the same rights as other citizens.

There is no evidence in the case at bar that Defendant was ever coerced into answering any question. The presence of his lawyer guaranteed that no untoward advantage would be taken of him.

As noted previously, Defendant was not in custody or under arrest when he was interviewed. He was free to, and did, leave after the interview terminated. With regard to the necessity for Miranda warnings under such circumstances, *Oregon v. Mathison*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), in syllabus, provides the answer:

> "1. 'Custodial interrogation' within meaning of Miranda rules means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of

action in any significant way."

"3. Miranda warnings are required only when there has been such a restriction on a person's freedom as to render him in custody."

We do not consider that police departmental rules which required Defendant to attend the September 10, 1979, interview deprived him "of his freedom of action in any significant way."

We conclude, therefore, that the trial court erred in sustaining Defendants's motion to suppress statements which he made at that interview. This case will accordingly be reversed and remanded to the court of common pleas with direction to overrule Defendant's motion to suppress, and thereafter to proceed with his trial, or such other proceedings as are authorized by law.

(Opinion January 27, 1981 at 5, 6. *See* Appendix.

Petitioner herein appealed the foregoing Decision to the Supreme Court of the State of Ohio, as previously indicated. That Court refused to hear the case, and this petition ensued.

ARGUMENTS

I. WHEN A PUBLIC EMPLOYEE IS ORDERED TO APPEAR AND ANSWER QUESTIONS UNDER PENALTY OF LOSS OF EMPLOYMENT, THE PRIVILEGE AGAINST SELF—INCRIMINATION PROHIBITS THE USE IN CRIMINAL PROCEEDINGS OF ANY STATEMENTS MADE.

Keith Kuhlman became a target of the Internal Affairs division of the Dayton Police Department in late August, 1979. Thereafter, he was ordered to appear for an internal affairs interview on September 10, 1979. Rule 8.3 of the Rules of Conduct of the Dayton Police Department required Keith Kuhlman to appear and answer questions. Failure to do so amounts to insubordination, the penalty for which is dismissal. (T. 18-19).

An astute analysis of this type of situation is found in the decision of *Marsh v. Civil Service Commission*, 64 Ohio App. 2d 151, 411 N.E. 2d (1977). There, in a case exhibiting constitutional questions similar to those at bar, the Court of Appeals of Lorain County issued an opinion which has now been contradicted by the Court of Appeals of Montgomery County in the instant appeal. The well reasoned opinion from Lorain County reviewed the public employee's 5th amendment dilemma;

> The privilege against self-incrimination must be given a liberal construction. *Miranda v. Arizona* (1966), 384 U.S. 436.
>
> The privilege is not bound by the form of the proceeding, but exists whenever the individual is sought to be compelled to incriminate himself. *McCarthy v.*

Arndstein (1924), 266 U.S. 34, 40; *Maness v. Meyers* (1975), 419 U.S. 449, 464. The assertion of the privilege cannot be burdened with any sanction making the assertion costly to the individual. *Malloy v. Hogan* (1964), 378 U.S. 1; *Griffin v. California* (1965), 380 U.S. 609. *The rule disposing of this appeal is, although an individual can be compelled to give testimony in a noncriminal proceeding, Garner v. United States (1976), 424 U.S. 648, 655, immunity must be given from subsequent prosecution based upon incriminating statements made during the proceeding. Baxter v. Palmigiano (1976) 425 U.S. 308, 316.*

The interaction of the privilege against self-incrimination with the right of the government to oversee the official activities of its employees has been the subject of several decisions of the United States Supreme Court. In *Garrity v. New Jeresy* (1967), 385 U.S. 493, police officers were questioned concerning the illegal fixing of traffic tickets and were told they could be discharged unless they answered. The officers gave statements which were subsequently used against them in a criminal proceeding. Indicating that the statements were coerced by the threat of discharge and could not be used in criminal prosecutions, the court reversed the convictions and declared, at page 497, as follows:

> *"The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the*

antithesis of free choice to speak out or to remain silent . . ."

The court again condemned the practice of confronting the individual with the Hobson's choice of possible criminal conviction in *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation* (1968), 392 U.S. 280. There, public employees were unlawfully discharged for refusing to waive their privilege against self-incrimination in administrative and grand jury proceedings. The privilege was not, however, held to be a shield behind which public employees could refuse to answer inquiries addressed to job performance. " . . . (P)ublic employees . . . subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." *Id,* at 285. This was borne out in *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation* (C.A. 2, 1979), 426 F 2d 619, certiorari denied (1972), 406 U.S. 961. The public employees were granted "use" immunity from prosecution but again refused to answer questions concerning their official duties. Their discharges were upheld. "Use" immunity from prosecution legitimizes the sanction of discharge for failure to account for the employee's job performance. See, *Lefkowitz v. Turley* (1973), 414 U.S. 70.

" . . . (A) public employer may discharge

an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, i.e., that failure to answer will result in dismissal but that answers he gives and fruits therof cannot be used against him in criminal proceedings . . . "*Confederation of Police v. Conlisk* (C.A. 7, 1973), 489 F 2d 891 894, certiorari denied (1974) 416 U.S. 956; see *Kalkines v. United States*, (Ct. Cl. 1973), 473 F 2d 1391. (There is of course no need to have advised Keith Kuhlman since he had his attorney present for such advice.)

This practice will result in, " . . . a rational accomodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify . . . " *Kastigar v. United States* (1972), 406 U.S. 441, 446. It keeps the privilege against self-incrimination intact and preserves the state's right to ensure the proper discharge of the great responsibility bestowed upon its servants. Since the *"use' immunity from prosecution derives from the Fifth and Fourteenth Amendments, it is unnecessary that the investigating body be impowered by state law to grant use immunity. Confederation of Police v. Conlisk*, supra, 489 F. 2d at 895, fn. 4 (emphasis added).

Marsh v. Civil Service Commission, supra, 155-57, 411 N.E. 2d 806-07.

The theories and principles enumerated in *Marsh* should apply in the case of Keith Kuhlman. The Court of Appeals below erroneously concluded that since Keith Kuhlman was not in custody at the September 10th interview, there was no necessity for "Miranda" rights and thus no constitutional basis for excluding statements made in the September 10th interview. Apparently, the Montgomery County Court of appeals and the Supreme Court of Ohio missed the issue. Custody, or lack thereof, should *not* be of concern here. The issue revolves around whether a governmental authority can order an interview to pursue internal administrative charges or criminal sanction. Clearly, *Marsh* and the cases of this Honorable Supreme Court cited therein, stand for the proposition that is is the choice of the govenmental authority to pursue one or the other, but not both, when 5th amendment rights are tred upon.

The right of an accused person to refuse to testify which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional inactment and it has been recognized as "one of the most valuable perogatives of the citizen". *See, Brown v. Walker*, 162 U.S. 591; *Quinn v. United States*, 349 U.S. 155. The Supreme Court of the United States has stated:

> (T)he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on the penalty of loss of employment.

Garner, supra, 392 U.S. at 279. Justice Brennan stated it somewhat differently in a concurrance in *Lefrowite v. Cunningham*, 431 U.S. 801 (1977) (Marshall Joining):

> I continue to believe that the Fifth Amendment privilege against self-incrimination requires that any juris-

> diction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution from any transaction revealed in that testimony, (citations omitted).

id. at 801.

As the Montgomery County Court of Appeals itself stated: "Clearly, if there are constitutional reasons why an inculpatory statement of an accused should be excluded, the court is obligated to suppress that statement." (Opinion, January 27, 1981 at 4, *see* Appendix.) The constitutional reasons not only exist, they are paramount.

Accordingly, the Court of Appeals erred by reversing the trial court's granting of Applellant's motion to suppress, therbeby deciding a question of constitutional importance in a way in conflict with the applicable decision of this Court. The Supreme Court of the State of Ohio in refusing to hear the appeal from the lower court would let this patent inconsistency with settled law go uncorrected.

II. INCULPATORY STATEMENTS OF A PUBLIC EMPLOYEE RECEIVED DURING AN EMPLOYER'S INVESTIGATION SHOULD BE SUPPRESSED FROM USE AT A CRIMINAL TRIAL WHEN THE PARTIES HAVE ENTERED A COLLECTIVE BARGAINING AGREEMENT PROHIBITING USE OF SUCH STATEMENTS "AT ANY STAGE (GRAND JURY OR TRIAL) IN ANY CRIMINAL PROCEEDING AGAINST THE EMPLOYEE."

III. THE GOVENMENT CANNOT USE EVIDENCE BY ITS OWN FAILURE TO APPRISE A DEFENDANT, DURING AN ADMINSTRATIVE PROCEEDING AGAINST HIM, OF CONTEMPLATED OR RECOMMENDED PARALLEL CRIMINAL PROCEEDINGS FOR THE SAME CONDUCT.

The prosecution intends to use at the trial in this matter the statement of Keith Kuhlman made on September 10, 1979. (See, State's Notice of Intention to Use Evidence, Appendix). Both the trial court and the Court of Appeals below agreed that such use is a violation of Article 8, Section I of the contract between the City of Dayton and the Dayton Fraternal Order of Police. (See Appendix.) However, the Court of Appeals erroneously ruled that such an agreement does not require exlusion of the intended evidence.

Initially, it must be noted that Article 8, Section I, is the embodiement and affirmation of the 5th Amendment rights of police officers. The officers agreed to submit requested information to management specificallly reserving their 5th Amendment right that the information would

not be used against them in criminal proceedings. The constitutional basis for applying the exclusionary rule to such information is readily apparent from a reading of the contract and the 5th Amendment. Therefore, the Court of Appeals below should have affirmed the trial court's decision to suppress the questionable evidence.

Nevertheless, the reasons for suppression of the September 10th interview go beyond the constitutional prohibitions. The City of Dayton will fail to uphold its contract with Keith Kuhlman if the questioned statements are not suppressed.

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.

United States v. Heffner, 420 F 2d 809 (1970). This rule should be followed even if the procedures grant protections greater than those afforded by the constitution, *United States v. Brod*, 324 F. Supp. 800 (1971)

It is also apparent that the intended evidence should be suppressed in that it was improperly obtained in a parallel civil proceeding. A similar situation occurred in *United States v. Rand*, 308 F. Supp. 1231 (N.D. Ohio 1970). Therein the government used a parallel civil proceeding to acquire evidence later used in a criminal proceeding. The Court stated

> The government, knowing but not informing defendants that criminal proceedings were pending, began a civil proceeding in which it obtained information useful in a subsequent criminal action. . . . It was elicited from a defendant who had been lulled into believing he was immunized from prosecution.

Rand, supra at 1234. The Court then referred to such proce-

dures as "obnoxious" and not only suppressed the evidence but dismissed the entire criminal action. Other cases are in agreement that administrative proceedings cannot be used for the purpose of gathering evidence in a criminal case. *See, e.g., United States v. Fruchtman,* 421 F 2d 1019 (1970) *cert. denied,* 400 U.S. 849 (1970).

When the exclusionary rule was applied to the States, this Court expressed part of the reasoning as follows:

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence . . .
>
> Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy (citations omitted).

Mapp v. Ohio, 367 U.S. 643, 659 (1961). The same concerns apply to the case at bar. The City of Dayton must be held to its agreement not to use information elicited through administrative channels against an employee in a criminal matter. Suppression of the evidence in question will insure compliance with the promise that the information "will not be used at *any* stage . . . in *any* criminal proceeding . . . " (F.O.P. Contract, Article 8, Section I.)

Accordingly, the collective bargaining agreement protecting Keith Kuhlman's rights not only embodies his constitutional rights, but also grants independent contractual rights. Either protection prohibits the use of the September 10th interview, and evidence derived therefrom, at trial. Thus, the Court of Appeals erred in reversing the motion to suppress granted by the trial court.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Writ of Certiorari was served upon Lee C. Falke, Attn: Dennis J. Langer and Harold B. LeCrone, Prosecuting Attorney for Montgomery County, Ohio, 41 North Perry Street, Dayton, Ohio 45402, by placing same in the regular U.S. mail, postage pre-paid, this _____ day of _____, 1981.

BRANNON & COX LAW OFFICES

_____

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Petitioner, Keith Kuhlman

CONCLUSION

The opinion of the Court of Appeals below is a unique and salutory departure from decisions of this Court which requires that inculpatory statements obtained by official compulsion be inadmissable in the criminal prosecution of the individual making those statements. As such it represents a breach in the wall errected by the Fifth Amendment to the Constitution and the decisons of this Court designed to protect the citizen from conviction by his government through the use of statements involuntarily wrung from him. The Writ of Certiorari should therefore be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 6907
Plaintiff-Appellant	:	
-vs-	:	
KEITH KUHLMAN	:	(APPENDIX "A")
Defendant-Appellee	:	
	:	

OPINION

Rendered on the 27th day of January, 1981

Lee C. Falke, Prosecuting Attorney for Montgomery County, Ohio,
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Attorneys for Defendant-Appellee

. . . . . .

ZIEGEL, P.J. (By Assignment)

This is a Crim. R. 12(J) appeal taken by the State from the order of the trial court sustaining Defendant's motion to suppress a statement he made on September 10, 1979. In its brief

the State does not in so many words specify any assignments of error. For the prupose of this decision, we will assume that there is only one error complained of, namely the trial court's sustaining of the motion to suppress.

Defendant is a City of Dayton police officer. On November 14, 1979, a three count indictment was returned against him, all arising out of alleged illegal dealings he had in connection with the recovery of a stolen motor vehicle. A further single cound indictment was returned on December 11, 1979, involving another phase of the same general incident. These cases were consolidated for trial in the common pleas court, and are also consolidated here for appellate purposes.

The suppressed statements were made during an administrative investigation being conducted by the Police Internal Affairs Section. Prior to the November 10, 1979 interview, there had been a previous one on August 15, 1979. At

the beginning of the court hearing on the motion to suppress, it was stipulated that Defendant had not been advised of his Miranda rights either before or during either the August 25th or September 10th interviews. It was further stipulated that Defendant's appearance on August 25th was by request, but that his September 10th appearance was by reason of an order to appear. It was also stipulated that Defendant was never told prior to either of these interviews that he was under arrest, and that he was free to go after each of the interviews.

At the court hearing it was brought out that during such investigations it was standard practice, if the person being investigated was believed to have been involved in criminal matters, to give that person Miranda warnings; that if on September 10, Defendant had refused to answer any questions, in defiance of an order to do so, he could have been subjected to

departmental action, which could have resulted in his dismissal. At all times during the September 10th interview, Defendant's counsel was present.

In arriving at the decision on the motion to suppress the trial court did not reach the constitutional issue raised by the failure to give the Miranda warnings. Instead, that court concluded that the September 10 statement violated "the spirit of Article 8, Section 1 of the F.O.P. contract" -- a labor contract between the organization of policemen and the City of Dayton. This portion of the contract provides:

> Investigation by Management
>
> Management may conduct investigations of alleged misconduct by an employee and require a member of the bargaining unit to submit written reports, either by general or specific order. If any report shows or tends to show that the employee submitting the report has committed a crime, the use of such report will be subject to the following:
>
> A. The report may not be used at any stage (grand jury or trial) in any criminal proceeding against the employee.

B. The report may be used by Management in taking action and in defending such action with respect to discharge or discipline of the employee.

C. Failure by an employee to complete the report may result in disciplinary action.

D. An on-the-spot interview during or pratically contemporaneous to the event in question does not require the presence of a grievance representative.

The State argues that since Defendant was not required to make any written report with regard to the matter being investigated, these provisions of the labor contract do not apply. In our opinion, that argument is overly technical. We agree with Defendant, that any "oral" statement that is recorded stenographically and reduced to a transcript, as was done here, is, for all practical purposes, a written statement, so that if Article 8, Section 1 applies at all to the legal situation before us, it applies here.

Cleraly, if there are constitutional reasons why an inculpatory statement of an accused person should be excluded, the court is

bbligated to suppress that statement. The question still remains, however, as to whether the courts are mandated to apply the exclusionary rule where the request for exclusion is based on some pre-existing contract between an interviewer and an interviewee which was formulated before, and without reference to, the subject matter of the interview, rather than on constitutional grounds. While there are ways in which a person may be granted immunity in exchange for testimony, we are not aware that a contract executed independently or any particular criminal procedure is one of them.

No cases regarding contractual exclusion have been cited for our benefit, and we have found none. This court has, however, ruled on the question of stautory, as distinguished from constitutional, exclusion in State v. Harding, Montgomery County Court of Appeals Case No. 6561 (unreported), decided September 23, 1980, where a movant sought to suppress evidence on the basis of former Section 1347.07(A) of the

Revised Code. In affirming the trial court's refusal to suppress, McBride, P.J., speaking for a unanimous court, stated:

> "In the first place we note that appellants' claims for relief are based entirely upon statutes, a violation of which, in our opinion, does not equate with nor rise to the level of a violation of a constitutional right. Moreover, inasmuch as Ohio has never independently adopted the exclusionary rule, such an extreme sanction is imposed only where federal law requires such."

If a statute cannot form the basis for the use of the "extreme sanction" of exclusion as to evidence available to the State for prosecutorial purposes, certainly neither can a provision in a labor contract.

To the extent that the trial court reasoned that the motion to suppress should be granted because of the provisions of a labor contract, we hold that it erred.

In his brief, Defendant contends that the lower court could have premised the suppression of the statements upon the Fifth and Fourteenth Amendment to the United States Constitution. He argues that since he was a police

officer, he was effectively coerced into submitting to the September 10 interrogation or face disciplinary action. While he had to attend the interview, he did not have to answer self incriminating questions. In Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967), New Jersey fired employees who exercised their right to remain silent. The Supreme Court held that confessions made under such circumstances were coerced, nto voluntary, and that public employees have the same rights as other citizens.

There is no evidence in the case at bar that Defendant was ever coerced into answering any question. The presence of his lawyer guaranteed that no untoward advantage would be taken of him.

As noted previously, Defendant was not in custody or under arrest when he was interviewed. He was free to, and did, leave after the interview terminated. With regard to the necessity for Miranda warnings under such circumstances,

Oregon v. Mathison, 429 U.S. 492, 97 S.Ct. 711, 50 L. Ed. 2d 714 (1977), in syllabus, provides the answer:

> "1. 'Custodial interrogation' within meaning of Miranda rules means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> "3. Miranda warnings are requred only when there has been such a restriction on a person's freedom as to render him in custody."

We do not consider that police departmental rules which required Defendant to attend the September 10, 1979 interview deprived him "of his freedom of action in any significant way."

We conclude, therefore, that the trial court erred in sustaining Defendant's motion to suppress statements which he made at that interview. This case will accordingly be reversed and remanded to the court of common pleas with direction to overrule Defendant's motion to suppress, and thereafter to proceed with his trial, or such other proceedings as are authorized by law.

CRAMER and SHERER, JJ., concur.

(Judge Paul Sherer, Retired from the Court of Appeals, Second Appellate District, Judge Fred B. Cramer, Retired from the Butler County Common Pleas Court, and Judge Donald L. Ziegel, Retired from the Butler County Common Pleas Court, Sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

Gary W. Crim
Dwight D. Brannon
Michael T. Hall

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 6907
Plaintiff-Appellant	:	
-vs-	:	FINAL ENTRY
KEITH KUHLMAN	:	
Defendant-Appellee	:	(APPENDIX "B") Filed: January 27, 1981
	:	

Pursuant to the opinion of this court rendered on the 27th day of January, 1981 the judgment of the trial court of Montgomery County, Ohio is reversed and remanded to that court with direction to overrule Defendant's motion to suppress, and thereafter to proceed with his trial or such other proceedings as are authorized by law.

Donald L. Ziegel, Presiding Judge

Paul Sherer, Judge

Fred B. Cramer, Judge

Copies mailed to:

Gary W. Crim
Assistant Prosecuting Attorney

Dwight D. Brannon, Attorney
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1026 One First National Plaza
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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 79 CR 1694 79 CR 1838
Plaintiff	:	
-vs-	:	JUDGMENT ENTRY
KEITH KUHLMAN	:	(APPENDIX "C")
Defendant	:	Filed: June 19, 1980
	:	

YEAZEL, J.

It is the opinion of the court that prior to September 10, 1979, Internal Affairs suspected criminal conduct on the part of the defendant, as evidenced by the testimony of Seargeant Fleming and Dective Duncan, and by Police Department procurement of the Corvette title before September 10, 1979. The true nature of the September 10, 1979 interview was not only for the purpose of internal investigation, but also to gather additional information which could be used and which is being used in a criminal prosecution against the defendant. This resulted in a change in the nature of the forum

without the defendant or his counsel being so informed.

The court is not saying Miranda warnings should have been given or were requred on September 10, 1979, nor is Miranda the basis for the court's ruling. The defendant was required to answer questions put forth by Sergeant Fleming under possible sanction by disciplinary measures pursuant to the Rules of Conduct of the Dayton Police Department, Rule 6.3. Given the existence of this potential sanction and the change in the nature of the forum, and in all fundamental fairness to the defendant and his counsel, Internal Affairs should have informed the defendant of the serious nature of the interview, and that criminal conduct was suspected.

For failure to so inform defendant and his counsel, the court gives effect to the spirit of Article 8, Section 1 of the F.O.P. contract, and orders suppression of all statements made by the defendant at the September 10, 1979

interview.

In light of this non-contitutionally based ruling, the court must determine the scope and extent of the suppression ordered. In no way does suppression of the September 10, 1979 statements made by defendant prevent the use of such statements on cross-examination for purposes of impeachment, provided the trustworthiness of the statements satisfies legal standards. Harris v. New York, 401 U.S. 222, 224 (1971). Under principles of the doctrine of "Fruits of the Poisonous Tree", as stated in Wong Sun v. United States, 371 U.S. 471 (1963), it follows that all evidence obtained as a direct or indirect result of statements made by defendant on September 10, 1979 must be considered tainted and therefore inadmissible. However, this taint is inoperative by showing such evidence to have "independent source", Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), or by showing the connection between the original

illegality and the subsequently discovered evidence has "become so attenuated as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341 (1939). In the case of any witnesses discovered as a result of the statements made by defendant on September 10, 1979, the court will follow the factors articulated in United States v. Ceccolini, 435 U.S. 268 (1978) in determining whether or not the original taint has been dissipated.

Judge

Harold B. LeCrone
Dennis J. Langer
On behalf of the prosecution;

Dwight D. Brannon
On behalf of the defendant.

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	CASE NO. 6907
Plaintiff-Appellant	:	NOTICE OF APPEAL
-vs-	:	
KEITH KUHLMAN	:	(APPENDIX "D")
Defendant-Appellee	:	Filed: February 13, 1981
	:	

Notice is hereby given that Appellee Keith Kuhlman hereby appeals to the Supreme Court of Ohio from the Opinion of this Court rendered on Janaury 27, 1981, and subsequent Entry, reversing and remanding the Judgment of the Court of Common Pleas of Montgomery County.

The issues in this cause involve substantial constitutional questions.

Respectfully submitted,

BRANNON & COX LAW OFFICES

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IN THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO — 1981 Term

City of Columbus — To wit: May 13, 1981

State of Ohio,

Appellee — No. 81 436

vs. (APPENDIX "E") — APPEAL FROM THE COURT OF APPEALS

Keith Kuhlman, — for Montgomery County

Appellant.

This cause, here on appeal as of right from the Court of Appeals for Montgomery County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of Court of Appeals for Montgomery County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this

Court.

Witness my hand and the seal of the Court this____day of_____ 19__.

_____Clerk

_____Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,	*	1981 Term
		To Wit: May 13,
CITY OF COLUMBUS,	*	1981
Appellee,	*	No. 81-436
-vs-	*	MOTION FOR LEAVE TO APPEAL FROM
KEITH KUHLMAN	*	THE COURT OF APPEALS FOR
Appellant	*	MONTGOMERY COUNTY
(APPENDIX "F")	*	

****

It is ordered by the Court that this Motion is overruled.

Costs:

Motion Fee, $20.00, paid by Dwight D. Brannon.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____, 19___

_____Clerk

_____Deputy

(APPENDIX "G")

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

(1) The Fifth Amendment, United States Constitution (Appendix)

(2) The Fourteenth Amendment, United States Constitution (Appendix)

(3) Ohio Rules of Criminal Procedure 12(J) (Appendix)

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for pbulic use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of

any State Legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

RULE 12

PLEADINGS AND MOTIONS BEFORE TRIAL: DEFENSES AND OBJECTIONS

(J) State's right of appeal upon granting of motion to return property or motion to suppress evidence.

The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay, and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgement or order granting the motion. Any appeal which may be taken under this rule shall be diligently prosecuted.

If the defendant has not been previously released, he shall, except in capital cases, be released from custody on his own recognizance pending such appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

Opposition

Office-Supreme Court, U.S.
F I L E D
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

Case No. 81-263

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KEITH KUHLMAN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

GARY WAYNE CRIM
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Counsel for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

1. Does this Court have jurisdiction in a State criminal proceeding where there has been no final judgment or decree rendered and the matter has been sent back to the Trial Court after an interlocutory appeal?

2. Is a police officer's confession to be suppressed when made in the presence of the police officer's attorney and when the police officer can choose whether or not to answer the question?

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Case No. 81-263

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KEITH KUHLMAN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATEMENT OF THE CASE

1. Petitioner, a Dayton police officer in charge of the auto theft unit, is charged with Theft in Office, Ohio Revised Code § 2921.41, selling a recovered stolen vehicle to another person; Forgery, Ohio Revised Code § 2913.31, presenting a receipt to the Bureau of Motor Vehicles with a signature that he knew was forged; Procuring Certificate of Title for a Stolen Motor Vehicle, Ohio Revised Code § 4505.19, procuring a certificate of title for a stolen motor vehicle; Falsification, Ohio Revised Code § 2921.13, presenting false documents, the certificate

of title and the forged receipt, to the Bureau of Motor Vehicles; and Theft in Office, Ohio Revised Code § 2921.-41, taking a Pennsylvania certificate of title to a stolen motor vehicle.

After petitioner's successful motion to suppress his confession to forging the receipt, the matter was appealed to the Montgomery County Court of Appeals which ordered petitioner tried with his confession being used against him (Montgomery County Court of Appeals Case No. 6907). His motion for leave to appeal was denied by the Ohio Supreme Court on May 13, 1981 (Ohio Supreme Court Case No. 81-436).

2. There are three interviews of petitioner which are important: August 15, 1979 (Ex. # 1), September 10, 1979 (Ex. # 2), and November 2, 1979 (Ex. # 3). On September 10, 1979, petitioner confessed to forging a name to a receipt (Ex. # 2, p. 17).

Petitioner requested an interview for August 15, 1979, with the Internal Affairs Office of the Dayton Police Department, to discuss the matter of a stolen motorcycle belonging to Sergeant Haller, another police officer. Sergeant Haller's motorcycle had been stolen and its number had been put on the 30-day hot sheet which goes to all dealers (Ex. # 1, p. 3). Petitoner's friend, Garry Ring, bought the motorcycle. Petitioner approved the motorcycle for a new title on the basis that the motorcycle had been rebuilt (Ex. # 1, p. 6). The motorcycle was found after Ring sold it to a neighbor (Ex. # 1, p. 3). In approving the rebuilt title, petitioner approved a 14-digit serial number when 13 digits were appropriate (Ex. # 1, p. 10).

In September, Sergeant Fleming requested an interview with petitioner. This was arranged for September 10, 1979. This time petitioner brought his attorney, Dwight

Brannon. At the beginning of the interview, Mr. Brannon stated:

> I might, for the record, let it be known that we would expect discovery of any and all other statements previously made by Keith in regard to this or any other investigation. I believe this office has received a letter to that effect or request to that effect already that we would wish to be provided with all discovery as quite clearly this is no longer an investigatory nature matter, but it has become accusatory even going to the point of attempting to obtain grand jury criminal charges (Ex. #2, p. 1).

During the interview, Mr. Brannon participated. On almost every page of the transcript, Mr. Brannon said something. At one point, he warned his client not to answer one of the questions (Ex. #2, p. 9). At another time, Mr. Brannon objected to a question which was rephrased to his satisfaction (Ex. #2, p. 11). He instructed his client to read everything that his client was given (Ex. #2, p. 13). Mr. Brannon also cautioned his client, "Give them what you remember, tell them what you know, . . ." (Ex. #2, p. 7).

When the following admission was made by petitioner, no objection was made:

> Kuhlman: He had a receipt from Bob Bach and he gave it to me and I lost it, so I just made the one up because it came from Bob Bach's he told me that motor and trans came from Bob Bach and he had a receipt for it.
>
> Fleming: Did you check with Bob Bach?
>
> Kuhlman: No, it was a receipt like it had West Third Street Auto Sales or Bach's West Third Street Auto Sale.

Fleming:	My question on it Keith, is it a valid receipt?
Kuhlman:	As far as I know it's a valid receipt.
Fleming:	Did you sign Bob's name on it? Or did Bob sign his name?
Kuhlman:	No I signed Bob's name on it (Ex. # 2, p. 17).

The discussion at that time was about a Corvette, the subject of these charges. Petitioner admitted that he had forged another name to the receipt that he used to get the title.

It is this statement of September 10, that the trial judge suppressed, and it is this statement that the Court of Appeals held should be admitted against petitioner at trial.

A third interview was held on November 2, 1979. At that time, petitioner was given the Miranda warnings. After the warnings, petitioner refused to answer any questions. At that time, he was not ordered to answer any questions. Without such an order, petitioner was not subject to disciplinary action for refusing to answer a specific question (Tr. 55). At no time during any of the three interviews was he ordered to answer any question (Tr. 55). After this interview was finished, he was not arrested but returned to duty.

REASONS WHY WRIT SHOULD NOT BE GRANTED

1. This Court does not have jurisdiction in a state criminal proceeding where there has been no final judgment or decree rendered and the matter has been sent back to the Trial Court after an interlocutory appeal.

This matter is still pending in the Ohio Courts. It began as a criminal proceeding by the State of Ohio against petitioner. After the granting of petitioner's motion to suppress evidence, the State of Ohio appealed to the Montgomery County Court of Appeals pursuant to the Ohio Rules of Criminal Procedure, Rule 12 (J). The Court of Appeals reversed the Trial Court and ordered the case to be tried with the petitioner's confession to Forgery being used against him. The Ohio Supreme Court overruled petitioner's motion for leave to appeal.

Petitioner's claim of jurisdiction in this Court is premised on 28 U.S.C., § 1257:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This Court discussed the extent of its jurisdiction in

interlocutory appeals in State Courts in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) under 28 U.S.C. § 1257. In that case, this Court reviewed the history of the determination of finality based on this section. The cases in which this Court would review an interlocutory state appeal, fell into four categories. In the first category, the federal issue, as a practical matter, concluded the litigation, *Mills* v. *Alabama,* 384 U.S. 214 (1966). In a second category, the federal issue finally decided by the highest Court in the State would require a decision regardless of the ultimate outcome of the State Court proceedings, *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Radio Station WOW* v. *Johnson,* 326 U.S. 120 (1945). In the third category, the federal issue would not survive for a review regardless of the outcome of the State Court proceeding, *California* v. *Stewart,* 384 U.S. 436 (1966), and *North Dakota State Pharmacy Bd.* v. *Snyder's Stores,* 414 U.S. 156 (1973). In the fourth category, the reversal of the State Court on the federal issue would preclude further litigation, and the failure to review immediately might seriously erode federal policy, *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Construction Laborers* v. *Curry,* 371 U.S. 542 (1963); *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555 (1963). The present case fits none of these categories.

Applying the *Cox Broadcasting* criteria to this case, this Court lacks jurisdiction at this time. The federal issue will not dispose of this case. The current litigation would not end if the petitioner's position were upheld. While not every granting of a motion to suppress may result in an appeal pursuant to Ohio Criminal Rule 12 (J), some of the counts in the indictment would still be prosecuted if petitioner's confession was suppressed. As to the second category, the federal issue would survive only if

the petitioner loses in the State Court. If the petitioner were to obtain a verdict of not guilty, any issue concerning the admissibility of his confession would be moot. As to the third category, the federal issue may survive if the petitioner is convicted as charged. In that event, the petitioner would be in a position to appeal his conviction and sentence when the Trial Court has entered a final judgment. As to the fourth category, some parts of the litigation will survive even if this Court determines that the petitioner's confession should not be admitted. This case does not involve the federal policies, such as the First Amendment, federal preclusion of state jurisdiction, or timeliness, which require immediate intervention by the Federal Courts in the pending criminal matter.

This Court has long held that Federal Courts should not intervene in pending State Court criminal proceedings. *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Hicks* v. *Miranda*, 422 U.S. 332 (1975); *Younger* v. *Harris*, 401 U.S. 37 (1971).

Thus, this Court lacks jurisdiction to review this State interlocutory appeal. The appropriate time for an appeal in this matter is after a conviction of the petitioner, if there is one.

2. A police officer's confession is not to be suppressed when made in the presence of the police officer's attorney and when the police officer can choose whether or not to answer the question.

In his argument, petitioner confuses being ordered to appear with being ordered to answer a question. The major case that he cites in support of his argument is an Ohio Court of Appeals case, *Marsh* v. *Civil Service Com-*

mission, 64 Ohio App. 2d 151, 411 N.E. 2d 803 (1977). There is one major difference between the actions of the firemen in *Marsh* and petitioner's actions. In *Marsh*, the firemen refused to talk to the authorities, but, here, petitioner, with his attorney present, talked for an extended period of time with the investigating officers. It is also clear in *Marsh* that the firemen were exercising their Miranda rights, having been told just prior to the questioning that they did have a right to remain silent. Here, petitioner requested the first interview; at the second interview, he was ordered to appear but he was not ordered to answer any questions; at the third interview, petitioner was ordered to appear, given his Miranda warnings, and exercised his right to remain silent, refusing to answer any questions. At no time during any of the three interviews was he ever ordered to answer a single question.

In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), this Court held that it is improper to use statements which were obtained by the government when the individuals being questioned were faced with the choice of either forfeiting their jobs or incriminating themselves. In *Garrity*, the police offcer had been told that anything he said might be used against him in any State criminal proceeding, that he had the privilege to refuse to answer if the disclosure would tend to incriminate him, but that if he refused to answer, he would be subject to removal from office, *Id.* at 494. Here, the petitioner was faced with no such choice. Rather, Sergeant Fleming was very careful to avoid putting petitioner in the position of having to make such a choice. Sergeant Fleming *never* ordered petitioner to answer any question. At one point (Ex. #2, p. 9), Mr. Brannon objected to a particular question. Sergeant Fleming did not order petitioner to answer the question, did not put him in the position of having to choose between incriminating

himself, or losing his job, but moved on to a different topic.

Thus, petitioner's confession to forgery was not coerced and is admissable against him in a trial on this matter.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari. First, this Court lacks jurisdiction due to the interlocutory nature of this appeal at this time. Second, this case presents no conflict with another State Court or Federal Court of Appeals, nor does it present an important question of federal law which needs to be settled by this Court.

Respectfully submitted:

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